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PUBLIC ENTITIES THAT OWN STORMWATER SYSTEMS HAVE TO TREAT STORMWATER BEFORE IT IS DISCHARGED

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Many public entities (e.g., cities, counties, special districts) provide an important service to their residents. To prevent flooding and other damage from heavy rainfall events, they have created systems for the collection and removal of stormwater. It is well known that stormwater gathers a variety of contaminants as it flows across the landscape and even through a stormwater drainage system itself. Such contaminants may include sediments, suspended metals, nitrogen, phosphorus, trash, used motor oil, pesticides, raw sewage, and various other toxics. The stormwater is often discharged into nearby rivers, wetlands, and lakes where, unfortunately, it contributes to surface and ground water pollution.

In a very recent opinion that has broad implications for the capital and operational budgets of all public entities, the Federal Court of Appeals for the Ninth Circuit has held that the Clean Water Act ("CWA") requires that stormwater discharge points (e.g., pipes releasing stormwater into rivers, wetland, and lakes) must have a National Pollutant Discharge Elimination System ["NPDES"] permit because such discharge points are a "point source". *NRDC v. County of Los Angeles*, 2011 U.S. App. LEXIS 4647 (3/10/11).

The Court also held that it does not matter who is responsible for the contaminants that the stormwater picks up; the CWA puts the onus of responsibility for remediating the stormwater before it is discharged on the public entity operating the stormwater system.

The pre-discharge remedial standards for stormwater will be laid out in the NPDES permit. These treatment requirements must be met before the stormwater can be released or discharged; it is important to bear in mind that states operating these types of programs under the CWA have the authority to impose more stringent requirements that those imposed by E.P.A. The generally applicable CWA standard requires a reduction of the contaminants in the stormwater to the "maximum extent practicable." To address such concerns, some public entities have routed stormwater to their sewage treatment plants. Unfortunately, unless the plant has enormous excess capacity, the stormwater will often overwhelm the treatment capacity of the sewage treatment plants causing untreated or partially treated sewage to be discharged - itself a potential violation of the CWA.

Thus, the treatment mandate that arises from this Ninth Circuit opinion will require some creative thinking about means and methods to reduce pollutants in stormwater if the requisite capital expenditures and operational costs are to be kept within reason. A system's approach is required, an approach that at a minimum considers management practices, control techniques and systems, and design and engineering methods to address contaminant reduction. At the very least, such a strategy will need to include:

- Assessment of causes (it is important to know the origins of contaminants impacting stormwater so that an effective program can be developed).
- Assessment of waters into which discharges are and/or will be made (since the objective is to improve overall water quality, the condition of the waters into which the stormwater is discharged needs to be known so that

the scope of the reduction of stormwater pollution that will be required is well understood).

- Public education and participation (so that residents understand that their acts and omissions can increase stormwater pollution [overuse of pesticides; failure to pick up pet fecal matter], and the steps they can take to minimize such contamination).
- Elimination of illicit discharges (e.g., pouring of used motor oil down storm drains).
- Construction site stormwater runoff control (because construction sites have their own standards, since they are a source of sediments, nutrients, trash, and some toxics, enforcement of permit conditions for construction sites is critically important).
- Post construction site stormwater management (part of building codes should be requirements that assure that stormwater will not carry away contaminants from homes and commercial complexes).
- Pollution prevention for municipal operations (governmental entities need to assure that their own practices and procedures for their facilities and operations minimize the release of contaminants that can be picked up by stormwater).
- Assessment of effectiveness (it is important to evaluate the programs and practices put in place to assure that they are having a beneficial effect upon stormwater pollution and upon the water into which the stormwater is discharged; if not, revisions and changes need to be made)

Fortunately, there is State and Federal funding available for some of these activities. However, in this era of tight budgets, such funding may be limited. Even so, the lack of third-party funding is never a defense to the required action.

Thus, this Ninth Circuit opinion not only holds the seed for many future lawsuits against governmental entities over stormwater practices, but clearly will require

the expenditure of substantial capital and operational outlays to assure that stormwater discharges minimize the pollutant load found in stormwater.

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